SUPREME COURT, U. S.

FILED

MAY 31 1969

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 182

THE SECURITY SEWAGE EQUIPMENT COMPANY,

Petitioner,

vs.

EDWIN F. WOODLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Ohio.

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PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

The petitioner, the Security Sewage Equipment Co., a corporation, asks that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio, made and entered on January 29, 1969 (Appendix, p. 19) denying petitioner's motions for appeal of right and for leave to appeal. A motion for reconsideration was denied on March 5, 1969 (Appendix, p. 19).

OPINIONS IN THE COURT BELOW.

Neither the Court of Common Pleas of Cuyahoga County, the Court of Appeals for the Eighth Appellate District of Ohio nor the Supreme Court of Ohio wrote an opinion in this case. The relevant entries from each court are reproduced in Appendix, p. 17.

JURISDICTION.

The final judgment of the Supreme Court of Ohio was entered on March 5, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3), Petitioner claims its rights were violated contrary to the Due Process and Equal Protection Clauses of Amendment XIV of the Constitution of the United States.

QUESTION PRESENTED.

Where a corporation is sued and counter-sues, is that corporation deprived of the due process and equal protection of law guaranteed by the Fourteenth Amendment of the United States Constitution when it is denied the right to represent itself in the suit, *despite the fact that it is without counsel* after a diligent but unsuccessful effort to secure a licensed member of the bar to represent it?

THE CONSTITUTIONAL PROVISION INVOLVED.

Amendment XIV, Constitution of the United States (quoted in pertinent part):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE.

Petitioner is an Ohio Corporation engaged in the manufacture and installation of sewage treatment plants. It was sued by its former attorney, the respondent, for legal fees allegedly owed. The action was filed in the Garfield Heights Municipal Court.

Petitioner retained an attorney and a general denial was filed. Shortly thereafter the attorney withdrew from the case. Petitioner's general manager, who is not an attorney at law, secured leave of Court to file an "Answer Pleading Counterclaim." This pleading in effect admitted that respondent had represented petitioner as alleged but charged that in the course of that representation respondent had been guilty of malpractice. The counterclaim demanded damages in an amount exceeding the jurisdictional limits of the municipal court and the case was certified to the Court of Common Pleas of Cuyahoga County pursuant to section 1901.22 (E) of the Ohio Revised Code. (Appendix, p. 20.) Respondent, appearing *pro se*, filed a motion in the Court of Common Pleas to strike petitioner's "Answer Pleading Counterclaim" from the file on the ground that the pleading was prepared and filed by a person not licensed to practice law in Ohio. It was respondent's contention, unsupported by Ohio statutory or decisional law, that a corporation cannot appear in court except through an attorney admitted to the bar. Respondent's motion to strike was granted. Petitioner then retained its present counsel and a motion for reconsideration was filed.

In this motion for reconsideration petitioner raised fundamental constitutional issues. It advised the court by attached affidavit that it had vainly sought to secure

counsel; that it had asked no less than ten attorneys in the Cleveland area to prosecute its counterclaim "but that in each and every case, due to the nature of this litigation, the attorney whose services have been solicited has refused to provide representation"; and that petitioner had "now retained Jerry Gordon as its attorney in the above matter but that Gordon had expressly limited his services in the litigation to those issues not directly related to the merits of the counterclaim." The Court was urged to reinstate petitioner's pleading and grant it leave to proceed in propria persona.[1] The Due Process and Equal Protection clauses of the Fourteenth Amendment were invoked and the contention made that

> [W]here a corporation, despite a diligent effort, cannot employ an attorney because of the peculiar subject matter of the litigation and at the same time is forbidden to appear through its own spokesman, who is not a member of the bar, it is effectively denied the constitutional guarantee of due process. * * *
>
> Due process of law signifies a right to be heard "* * *. There must be an orderly proceeding, in which the person sought to be affected has the opportunity to defend, enforce, and protect his rights, *upon equal terms with the party instituting the proceeding.*" (Emphasis added.)[2]

---

[1] No Ohio statute would have precluded the court from responding affirmatively to such an application. Section 1701.03 of the Ohio Revised Code provides in pertinent part:

> A corporation may be formed for any purpose or purposes, other than for carrying on the practice of any profession * * *.

For a corporation to represent itself in litigation after attempting but failing to secure licensed counsel to represent it can hardly be called the "carrying on the practice" of a profession.

[2] Citing 11 *Ohio Jur.* 2d, Section 725, p. 73.

The same constitutional arguments were advanced on appeal in the state appellate courts. See pp. 15-16, petitioner's brief to the Court of Appeals; and page 11, petitioner's Memorandum in Support of Jurisdiction filed with the Ohio Supreme Court.

The Court of Common Pleas granted petitioner's motion for reconsideration but in the same order affirmed its prior ruling striking petitioner's pleading from the file. Appeal was then taken to the Court of Appeals of Ohio but the appeal was dismissed on the ground that the order appealed from was not a final order. During oral argument on the motion, members of the Court distinguished an order "striking" a pleading from the file from one "dismissing" such pleading. Counsel for petitioner was advised to return to the Court of Common Pleas and obtain an order dismissing the pleading as a precondition for an appeal.

Petitioner returned to the Court of Common Pleas, advised the court that since it could not secure an attorney to prosecute its claim it would not plead further and asked the Court to dismiss its pleading so that it could test the Court's previous order denying it the right to appear in propria persona. The Court of Common Pleas then issued the following order:

> Defendant's motion for final order dismissing "answer pleading counter-claim" stricken, there being no counter-claim presently before the court—*Case returned to Garfield Heights Municipal Court, for which judgment is entered.* (Emphasis added.)

Petitioner appealed from this order to the Court of Appeals. Before the matter could be heard on the merits, respondent moved to dismiss the appeal on the now familiar ground that the order appealed from was not a

final appealable order. The Court of Appeals granted the motion without addressing itself to petitioner's claim that the corporation was being denied its day in court. Petitioner appealed to the Ohio Supreme Court and respondent again moved to dismiss the appeal on the same ground of an alleged absence of a final order. Briefs were filed pro and con and the *Ohio Supreme Court overruled the motion.* The Court then heard oral argument to determine whether it would grant a full scale review. In the course of oral argument—with the Court first stating that its concern was with the constitutional issues posed—respondent asserted that the counterclaim was frivolous and without merit and that it was designed to delay the payment of legal fees allegedly owed him. The Chief Justice of the Ohio Supreme Court then asked respondent if it were not true that a natural person filing the same pleading filed by petitioner would have a hearing on the claim. Respondent conceded this was so. Despite this exchange, the Ohio Supreme Court dismissed petitioner's appeal "for the reason that no substantial constitutional question exists herein."

REASONS FOR GRANTING THE WRIT.

I. UNLESS THIS COURT GRANTS RELIEF, PETITIONER WILL BE SUBJECT TO A DEFAULT JUDGMENT WITHOUT TRIAL, WITHOUT COUNSEL, WITHOUT A HEARING AND IN VIOLATION OF RIGHTS ASSURED IT UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The basic issue in this case goes to petitioner's right to its day in Court. Since petitioner has been denied leave to proceed in propria persona and since it cannot obtain counsel to represent it, it is, in effect, being subjected to a default judgment.[3] Petitioner has been unable to discover, nor has respondent been able to cite, a single instance in the history of American jurisprudence where a corporation has been so penalized.

The inability of petitioner to secure counsel to prosecute its counterclaim is not in issue. Indeed, in his brief opposing petitioner's motion for rehearing in the Ohio Supreme Court, respondent wrote:

> It is interesting to note the observation of appellant's counsel that "the question here, obviously, is not the relative merits or demerits of defendant's counter-claim, for whether such counter-claim is partly or even totally frivolous and without merit is something that may be determined at trial."
>
> Appellant's counsel overlooks the fact that the question as to whether the appellant's proposed counter-claim is "totally frivolous and without merit" as (sic) something that should be determined not

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[3] In fact such a judgment was actually rendered following the Ohio Supreme Court's refusal to grant review (Appendix, p. 20). The Clerk of the Municipal Court placed the case on the Garfield Heights trial calendar and failed to remove it after being notified of petitioner's appeal to this Court. The default judgment was subsequently vacated upon petitioner's motion. (Appendix, p. 20).

only before trial but before an attorney prepares and files such a claim on appellant's behalf.

Canon number 31 of the Canons of Professional Ethics, adopted and included as a part of the rules of this Court, fully answers the appellant's contention, as follows:

> "No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants. The responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions."

Respondent's conclusion is that since an attorney cannot be found to argue petitioner's claim, the claim should not be heard.

This is a dangerous doctrine. It gives members of the bar an effective veto over claims which corporations might otherwise assert. A warning against such a system was sounded by the court in *A. Victor & Co. v. Sleininger*, 255 App. Div. 673, 9 N.Y.S. 2d 323, 326 (1939). After examining arguments supporting a rule barring corporations from appearing in court without an attorney, the Court said:

> The dangers pointed to in these arguments are more theoretical than substantial. Few corporations will do without the services of licensed attorneys in their litigations.
>
> In our opinion an argument on the other side far outweighs those mentioned above. It appears when

> "we ask ourselves this question: Suppose a corporation were too impoverished to employ a lawyer to defend it, or *suppose it had a large claim it believed to be just but could find no lawyer who would take the case, believing it hopeless, should the corporation be denied its day in Court?* (Emphasis added).

A United States Court of Appeals deemed the above reasoning "persuasive." *Schifrin v. Chenille,* 117 F. 2d 92, 95 (C.A. 2nd 1941).

Respondent has attempted to obfuscate the clear cut violation of petitioner's constitutional rights by arguing:

> 1. The issue before the Court is procedural, not constitutional, involving only the question of whether the order appealed from was a final, appealable order.
>
> 2. There is no showing in the record that petitioner can not obtain counsel to *defend* itself against suit, even if it can not secure an attorney to prosecute its counter-claim.

These arguments warrant separate consideration.

A. The Constitutional Issues in This Case Are Transcendent and Reveal Blatant Violations of Petitioner's Right to Due Process and Equal Protection of Law as Guaranteed by the Fourteenth Amendment of the United States Constitution.

There is no doubt that a corporation may not be deprived of its property without due process of law. *Smyth v. Ames,* 169 U.S. 466, 522, 526 (1898); *Kentucky Co. v. Paramount Exch.,* 262 U.S. 544, 550 (1923); *Liggett Co. v. Baldridge,* 278 U.S. 105, 111 (1928). Due process of law signifies a right to be heard, *Holt v. Virginia,* 381 U.S. 131 (1965); *Shields v. Utah Idaho C.R. Co.,* 305 U.S. 177 (1938); *Ochoa v. Hernandez,* 230 U.S. 139 (1913); and that right is effectively abrogated if a corporation's

pleadings are dismissed due solely to its inability to obtain counsel.

It is equally clear that corporations are embraced within the ambit of the Equal Protection Clause of the Fourteenth Amendment. *Santa Clara Co. v. South Pac.* Railroad, 118 U.S. 394, 396 (1886). Equal protection of the laws means that:

> [A]ll persons should be equally entitled to pursue their happiness and acquire and enjoy property; *that they should have like access to the courts of the country for the protection of their persons and property,* the prevention and redress of wrongs * * *; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances * * * (Emphasis added.) *Barbier v. Connolly*, 113 U.S. 27, 31 (1885).

Because these constitutional principles are so obvious and their violations in the instant case so gross, respondent has from the inception of the proceedings sought to confine the issues to technical matters of pleadings and procedure. The only issue in the case, he argues, is whether the order appealed from was a final order.

That issue was thoroughly argued in briefs filed with the Ohio Supreme Court as a result of respondent's motion to dismiss the appeal. Since the Court overruled the motion and since it dismissed petitioner's appeal on an entirely different ground, *i.e.*, "no substantial constitutional question exists herein," the finality of the Court of Common Pleas' order[4] is no longer in issue. It is true that the Court of Appeals bypassed petitioner's constitutional claims on procedural grounds but the same cannot be said of the Ohio Supreme Court. In his brief filed with the

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[4] That order in part provided:

"Case returned to Garfield Heights Municipal Court, for which judgment is entered."

Ohio Supreme Court, respondent acknowledged that this case "was returned to the Garfield Heights Municipal Court for the simple reason that the appellant's counterclaim * * * was no longer in the case and, therefore, the reason for retaining the case in the Court of Common Pleas no longer existed." ' An unbroken line of authorities in Ohio holds that the termination or dismissal of a counter-claim (or cross-petition) constitutes a final and appealable order.[5]

No state appellate court has afforded petitioner a full hearing on its contention that it has a constitutional right to represent itself since it is unable to obtain counsel. Yet petitioner finds itself in this posture:

1. Trial in the case will proceed in the Garfield Heights Municipal Court unless petitioner secures relief from this Court.

2. Petitioner is without counsel and without prospect of securing counsel.

3. Petitioner's counterclaim is "no longer in the case" and its answer was stricken as well.[6]

Petitioner's plight is attributable not to the absence of a final and appealable order but rather to the presence of an alleged rule barring corporations from appearing in propria persona. Even assuming the existence and vi-

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[5] See for example *Carpenter v. Canal Company*, 35 Ohio St. 307, 315 (1880); *Latham v. Ransome Concrete Machinery Co.*, 13 Ohio L. Abs. 63 (1932); *Morehead v. Central Trust Co.*, 54 Ohio App. 9, 5 N.E. 2d 932 (1935); *Yendes v. Shaw*, 81 Ohio App. 232, 78 N.E. 2d 696 (1947); *Summit-Portage Concrete & Supply Co. v. Hunter*, 1 Ohio App. 2d 545, 206 N.E. 2d 10 (1965). In spite of the unanimity of authority on the question, the Court of Appeals refused to certify this case to the Ohio Supreme Court (Appendix, p. 18).

[6] "An order striking out an answer, as it ends the cause, leaves the action undefended, and confers a right to immediate judgment, is subject to review in the appellate court." *Fuller v. Claflin*, 93 U.S. 14 (1876).

ability of such a rule—founded in the common law—it is plain that under the facts and circumstances of this case, such a "rule" must yield to the constitutional imperatives assuring parties their day in court. "The common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Funk v. United States*, 290 U.S. 371, 383 (1933); and see *Hurtado v. California*, 110 U.S. 516, 530 (1884). The case at bar presents the Court with the opportunity to re-assert that basic principle and to prevent an obvious injustice in the process.

B. The Claim That Petitioner Was Able to Obtain Counsel to Defend Itself Against Suit Even Though It Could Not Obtain Counsel to Prosecute Its Counter-Claim Is False and Unsupportable as Well as Being Totally Irrelevant.

1. None of the Ten Attorneys Contacted by Petitioner Would Provide Representation.

In his brief filed with the Ohio Supreme Court opposing rehearing, respondent contended that "nowhere in the record before this Court is there any statement that the appellant could not secure counsel to defend itself against the cause of action set forth in the plaintiff's petition." This claim was also registered by respondent when he orally represented to the Ohio Supreme Court that the original attorney retained by petitioner would have defended the case but withdrew only because petitioner insisted on pressing its counterclaim.[7]

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[7] Respondent claimed to know this as a result of his conversations with petitioner's original attorney. No memorandum or statement from the attorney appeared on the record at the time. To preclude such further "representations" by respondent, petitioner asked the attorney involved to indicate in writing precisely what the nature of his representation was (see Appendix, opposite p. 20).

Petitioner's affidavit filed in the Court of Common Pleas states that its general manager had

> consulted with no less than 10 attorneys in the Cleveland area, but that in each and every case, due to the nature of this litigation, the attorney whose services have been solicited has refused to provide representation.

It is true that the above quoted language is preceded by the statement that petitioner had made a diligent effort to secure counsel for purposes of prosecuting the *counterclaim*. But the decisive point is this: *The counterclaim is in essence an affirmative defense to respondent's petition.* The "Answer Pleading Counterclaim" *acknowledges* that respondent provided legal services in petitioner's employ. The sole defense is the affirmative claim that respondent was guilty of malpractice *in the course of that employment*. The "answer" and the "counterclaim" are, in short, inseparable and inextricable.

Petitioner has never had an attorney in this case who was prepared to try it on the merits. The original attorney retained "at no time intended to defend the Security Sewage Equipment Company against Mr. Woodle" (Appendix, opposite p. 20).

2. The Due Process and Equal Protection Provisions of the Fourteenth Amendment Are As Applicable to Affirmative Suits As They Are to Defensive Actions.

The constitutional guarantees of due process and equal protection of law have never been qualified or interpreted in the fashion suggested by respondent. Even if petitioner could obtain counsel *solely* to defend itself against the petition filed in this case, which admittedly it has not sought to do, that would hardly satisfy its constitutional claims. The primordial promise of our legal system that every party shall have his day in court is not

fulfilled if the party may appear only in the capacity of a defendant. Petitioner here claims substantial injury. If it had initiated this action and filed a petition through its general manager, the same issue of its right to secure a hearing on its claim for damages would require resolution. The question is whether that right can be obliterated solely because the several Cleveland attorneys whose services petitioner solicited will not join the issue against a fellow member of the bar.

The petition and counterclaim filed by the parties form two sides to the same case. Both relate to transactions arising from the same or related events. Under Ohio law petitioner's right to file such counterclaim is beyond dispute.[8] Other persons similarly situated and with a like counterclaim would in the normal course of events receive a full hearing. Respondent's frenetic efforts to bar the counterclaim from this case were successful in the state courts only because a judicially imposed rule, i.e., proscribing a corporation from filing a pleading except through an attorney, was built into the statute allowing counterclaims and then combined with an indefensible disregard for rights assured petitioner by the Fourteenth Amendment of the United States Constitution.

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[8] Section 2309.16 of the Ohio Revised Code defines a counterclaim as

> a cause of action existing in favor of one or more defendants against one or more plaintiffs * * * and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim * * *
>
> Such counterclaim shall not be limited to the amount claimed by the plaintiff * * * against whom such counterclaim is asserted. * * *

II. THIS COURT'S AUTHORITATIVE INTERVENTION IS NECESSARY TO CURB A SYSTEM GRANTING ATTORNEY-LITIGANTS A FAVORED, PROTECTED AND ELITE STATUS.

When a lawyer turns litigant he is clearly entitled to all of the rights, privileges and immunities enjoyed by lay litigants. But he is entitled to no more than that. Where courts shield attorneys from the ordinary processes of the law, the inevitable effect is an undermining of public faith in both the judiciary and the legal profession.

Courts do favor the lawyer-litigant to the prejudice of his adversary. The problem is a serious one. In 63 *Colum. L. Rev.* 1292, 1312 (1963), the author writes:

> The majority of decisions [in attorney malpractice cases] reflect (sic) a superficial analysis that is almost certainly colored by the fraternal concern of the judiciary for members of the practicing bar * * *.[9]
>
> Attorney malpractice litigation raises delicate and complicated questions involving the public interest in the maintenance of high professional standards and the compensation of aggrieved clients as well as the interest of the bar in the protection of its members from frivolous claims * * *. Because erosion of public confidence in the legal profession would inevitably undermine respect for the entire legal system, it is particularly important that the public not have basis for believing that attorneys are afforded special treatment that effectively insulates them from liability.

Whether or not the claim in the instant case is "frivolous" can only be determined upon trial. But the trial must not be an ex parte proceeding. To permit the attorney-respondent to represent himself in court while denying the same right to the corporation-petitioner—which

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[9] For a similar and much publicized view, see *Bloom, The Trouble With Lawyers,* 69-82 (1968).

wanted but could not secure counsel to represent it—would exacerbate existing inequities already favoring the lawyer-litigant. This factor, coupled with the patent constitutional violations described above, provides substantial reasons for this Court to grant a full review.

CONCLUSION.

In the event the Writ issues as prayed for and petitioner's claimed right to represent itself is ultimately vindicated, the parties can go forward to trial, each prosecuting its claim and defending against the other's. This does not mean that the parties will proceed on an equal footing. The advantage will clearly lie with respondent, an attorney with vast experience. But the inequality would then be rooted in human and not constitutional factors. And petitioner would have its day in court.

The alternative is the ex parte proceeding which awaits petitioner in the event the writ is denied. To avert this injustice and to fortify the principle that no group in this nation—not even lawyers—enjoys special privileges in our legal system at the expense of others, the Court is respectfully urged to grant certiorari.

Respectfully submitted,

RALPH RUDD,
Attorney for Petitioner.

Of Counsel:
JERRY GORDON.

APPENDIX.

PRIOR OPINIONS, ORDERS AND JOURNAL ENTRIES.

January 5, 1967, Garfield Heights Municipal Court.

The Court on its own motion finds that the counterclaim in this case is beyond the monetary jurisdiction of this Court, and the case is therefore certified to the Court of Common Pleas of Cuyahoga County pursuant to the provision R.C. 1901.22E.

March 9, 1967, Court of Common Pleas of Cuyahoga County.

Motion to strike is granted to which defendant excepts. Leave granted defendant to plead by 3-25-67.

July 20, 1967, Court of Common Pleas of Cuyahoga County.

Motion for reconsideration granted. Upon consideration of all briefs filed relative to the merits of said matter the Court adheres to its prior ruling on this motion. Request for oral hearing denied.

November 9, 1967, Court of Appeals of Eighth Appellate District.

Motion by Pltff-Appellee to dismiss appeal with prejudice granted. No final order. Appeal dismissed at appellant's costs. Mandate to issue.

January 25, 1968, Court of Common Pleas of Cuyahoga County.

Defendant's motion for final order dismissing "answer pleading counterclaim" stricken, there being no counterclaim presently before the court—Case returned to Garfield Heights Municipal Court, for which judgment is entered.

June 19, 1968, Court of Appeals of Eighth Appellate District.

Motion by pltff appellee to dismiss appeal granted. Appeal dismissed at appellant's costs. Exceptions. Mandate to issue. Motion by pltff. appellee for order assessing counsel fees overruled. Exceptions.

September 13, 1968, Court of Appeals of Eighth Appellate District.

Motion by defendant appellee (sic) to certify the record of this case to the Supreme Court overruled. Exceptions.

Journal Entry of the Supreme Court of Ohio, October 23, 1968.

Upon consideration of the motion to dismiss filed by appellee, it is ordered by this Court that this motion be overruled.

Mandate of the Supreme Court of Ohio January 29, 1969.

To the Honorable Common Pleas Court

Within and for the County of Cuyahoga, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Appeal dismissed, sua sponte, no substantial constitutional question involved.

Journal Entry of the Supreme Court of Ohio, January 29, 1969.

Motion for an order directing the Court of Appeals for Cuyahoga County to certify its record.

It is ordered by the Court that this motion is overruled.

Journal Entry of the Supreme Court of Ohio, January 29, 1969.

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

Journal Entry of the Supreme Court of Ohio, March 5, 1969.

It is ordered by the court that rehearing in this case is denied.

May 12, 1969, Garfield Heights Municipal Court.

This cause came on for trial on the 30th day of April, 1969 before the Honorable Eugene H. Wiswell, Acting Judge, upon the petition of the plaintiff and upon the evidence, the defendant being in default of answer or other pleading.

Upon consideration thereof, the Court finds that there is due and owing to the plaintiff from the defendant for legal services rendered the sum of Seven Thousand Three Hundred and Fifty Dollars and Fifty Cents ($7,350.50) and that the allegations of the plaintiff's petition are fully supported by the evidence.

Judgment is accordingly rendered in favor of the plaintiff and against the defendant in the amount of Seven Thousand Three Hundred and Fifty Dollars and Fifty Cents ($7350.50) and for all costs of this action.

May 16, 1969, Garfield Heights Municipal Court.

Upon motion of defendant and for cause well taken, the default judgment formerly granted to plaintiff is, and it is hereby ordered to be, vacated and expunged from the record.

STATUTE.

Section 1901.22E, Ohio Revised Code:

In any action in a municipal court in which the amount claimed by any defendant in any statement of counterclaim exceeds the jurisdictional amount, the judge shall certify the proceedings in the case to the court of common pleas, except in the Cleveland municipal court.

CORRESPONDENCE FROM PETITIONER'S ORIGINAL COUNSEL.

(See opposite page.)

PHONE 621-6070

EUGENE SIDNEY BAYER
ATTORNEY AT LAW
819 NATIONAL CITY BANK BUILDING
CLEVELAND, OHIO

May 5, 1969

Jerry Gordon, Esq.
Standard Building
Cleveland, Ohio 44113

Re: Woodle
vs
Security Sewage Equip. Co.
Case #6992

Dear Mr. Gordon:

I have this morning received authorization from Ray C. Blackburn, General Manager of The Security Sewage Equipment Company to discuss with you the nature of my representation in the above captioned case. Be advised that I at no time intended to defend The Security Sewage Equipment Company against Mr. Woodle. This was especially true because the defenses advanced to me by the client were grounded in malpractice which I could not in good conscience plead from the facts at my disposal.

The fact that I filed a general denial in the above captioned case may only be construed as a step which was necessary to preserve the client's rights and to require the plaintiff to put on his proof.

Very truly yours,

Eugene Sidney Bayer

ESB:mlb
cc-Ray C. Blackburn

Office-Supreme Court,
FILED
JUL 16 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. [redacted] 182

THE SECURITY SEWAGE EQUIPMENT COMPANY,
Petitioner,

vs.

EDWIN F. WOODLE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

EDWIN F. WOODLE,
628 Keith Building,
Cleveland, Ohio,
Respondent,
In Propria Persona.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1466.

THE SECURITY SEWAGE EQUIPMENT COMPANY,
Petitioner,

vs.

EDWIN F. WOODLE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

The State Court has not decided a federal question of substance, nor has the State Court decided any question in a way which is not in accord with applicable decisions of this Court. No real or substantial constitutional question is involved herein.

QUESTION PRESENTED.

Petitioner claims that it was denied due process of law and the equal protection of the law in violation of the Fourteenth Amendment of the United States Constitution, because it was denied the right to represent itself in this action under the facts and circumstances disclosed by the record and pleadings.

STATEMENT OF THE CASE.

Petitioner is an Ohio corporation. Petitioner, by counsel other than the respondent, instituted an action in the Common Pleas Court of Cuyahoga County at Cleveland against the Deputy Health Commissioner of the County. The action sought a recovery of both compensatory and punitive damages. The action was grounded upon damages allegedly sustained by the petitioner as a result of a conflict of interest caused by an engagement by the Deputy Health Commissioner in a competing business. After that action had been pending for more than a year, the respondent was retained by the petitioner as associate trial counsel.

So far as could be determined, the action itself was without precedent. No reported case could be found anywhere in which a recovery of damages was sought based upon an alleged conflict of interest.

Respondent continued as associate counsel until the conclusion of the trial. The trial itself required five weeks, twenty-four trial days. At its conclusion, the jury impanelled returned a verdict for the defendant, adverse to the petitioner.

The petitioner refused to pay anything for services rendered by the respondent on the trial of that action. Thereupon the respondent instituted this action in quantum meruit for the reasonable value of the services rendered in the amount of Seven Thousand Three Hundred Fifty Dollars and Fifty Cents ($7,350.50). This action was filed in the Garfield Heights Municipal Court.

The petitioner employed counsel to represent it in this action. Counsel so employed prepared an answer to the respondent's petition. That answer was verified and was filed in the action. The petitioner in its Statement of the Case refers to that answer as a general denial. In

fact, it was not a general denial, since the rules of the municipal courts in the State of Ohio do not permit general denials. The answer of the petitioner in that case contains specific denials of various allegations of the respondent's petition therein.

Subsequently, at a pre-trial hearing of the case, petitioner stated its desire to file a cross-petition against respondent and was extended a leave of two weeks within which to do so. Counsel representing the petitioner declined to prepare or file a cross-petition for reasons which will be referred to hereafter. Upon the insistence of the petitioner that such a cross-petition be filed, counsel for petitioner withdrew.

However, the petitioner's answer was not withdrawn by counsel and the case remained at issue before the Garfield Heights Municipal Court upon the petition of the respondent herein and the answer of the petitioner herein. It remained at issue until the petitioner-corporation prepared and filed in place of its original answer a pleading denominated "Answer Pleading Counter-Claim." Under the law of Ohio, the original answer filed by petitioner's counsel was considered as having been superseded and was no longer of any force and effect.

It is the action of the Ohio courts in dealing with the petitioner's Answer Pleading Counter-Claim that constitutes the basis for all of the complaints on behalf of the petitioner herein which followed, including the present attempt to secure the allowance by this Court of the petition for a writ of certiorari.

The petitioner's pleading was stricken from the file of the case for the reason that it was not prepared, and was not filed, by an attorney and for the reason that a corporation such as the petitioner, under the facts of the instant case, had no right to appear and to seek to present

a counter-claim except by and with the service of counsel.

The petitioner in its Statement of the Case asserts "that it had vainly sought to secure counsel; that it had asked no less than ten attorneys in the Cleveland area to prosecute its counter-claim 'but that in each and every case due to the nature of this litigation, the attorney whose services have been solicited has refused to provide representation.' "

The quoted statement of the petitioner appeared in an affidavit executed by the General Manager of the petitioner attached to petitioner's motion filed in the Court of Common Pleas of Cuyahoga County for reconsideration of an order striking petitioner's counter-claim. Nowhere in that affidavit, or elsewhere, has the petitioner asserted that it was unable to secure counsel to prepare a proper counter-claim, or to prepare the counter-claim which was in fact filed by it.

At no time did the petitioner file an affidavit asserting that it had consulted counsel other than its original counsel of record for the purpose of preparing and filing a counter-claim. The petitioner's affidavit which is referred to on page 4 of its petition herein, refers only to its attempt to secure counsel "to prosecute its counter-claim," which the petitioner had undertaken to prepare and to file without benefit of counsel.

LAW AND ARGUMENT.

Petitioner's Representation by Counsel.

In considering petitioner's attempt to secure the allowance of its Petition for a Writ of Certiorari, perhaps the first consideration which will naturally come to the attention of the Court is the circumstance that in presenting its Petition before this Court the petitioner is in fact presently represented by counsel. In fact the petitioner is presently represented by two counsel, as appears from the Petition filed by it in this Court.

It is of more than passing moment, therefore, to consider why a corporation who is presently represented before this Court by two members of the bar seeks the attention of this Court to argue the merits of its claim that it had an absolute right to appear in a trial court of the State of Ohio without benefit of counsel.

The petitioner, who is now represented by counsel before this Court, complains that it was not accorded the equal protection of the law because it was refused the right to present and to try its own counter-claim without benefit of counsel, notwithstanding the fact that neither in Ohio nor elsewhere may corporations appear and represent themselves in a court of law.

On page 4 of the Petition in the case at bar, it is pointed out that the petitioner advised the Court of Common Pleas of Cuyahoga County that it had "now retained Jerry Gordon as its attorney in the above matter, but that Gordon had expressly limited his services in the litigation to those issues not directly related to the merits of the counter-claim." Jerry Gordon is one of the attorneys appearing as counsel for the petitioner before this Court.

"Those issues," referred to in the above affidavit submitted by the petitioner to the Court of Common Pleas, involved only the claimed right of the petitioner to appear

and to represent itself, without benefit of counsel, in the filing and prosecution of its counter-claim in the State Courts of Ohio. It is a conclusion which, although not clearly stated, cannot be avoided, that present counsel for the petitioner are also limiting their services to "those issues" and are equally declining to represent the petitioner on the issues "directly related to the merits of the counter-claim."

It is generally estimated that there are approximately forty-five hundred practicing attorneys maintaining their offices in Cuyahoga County, Ohio. In addition, some twenty-five hundred additional attorneys, having offices in surrounding adjacent counties, generally and frequently practice in Cuyahoga County. When the petitioner initiated the proceeding which is now before this Court, the petitioner, by affidavit, asserted that "no less than ten attorneys in the Cleveland area" had been consulted by it and had declined to assist the petitioner "to prosecute his counterclaim." "The Cleveland area" includes the counties above referred to wherein some seven thousand attorneys practice and maintain their offices.

This Court may well doubt the claim of the petitioner to have undertaken a thorough and conscientious effort to find counsel to represent it. In particular, we suggest that the nature of that effort is hardly such as to merit the attention and consideration of this Court, even if to the "no less than ten attorneys" referred to in petitioner's affidavit there were added the two counsel who presently represent petitioner.

The sole basis for the proceeding before this Court can be nothing other than the affidavit of the petitioner before the Court of Common Pleas of Cuyahoga County referred to on pages 3 and 4 of its Petition. In that affidavit, petitioner concedes that "in each and every case, due to the

nature of this litigation, the attorney whose services have been solicited has refused to provide representation."

The chief significant words in the above quoted statement of the petitioner are the words "due to the nature of this litigation." However, the significance is not at all that which the petitioner seeks to assign. The significance of those words: "the nature of this litigation," lies in the fact that the litigation which the petitioner seeks to institute and prosecute is in fact frivolous and entirely without merit. Of course, as pointed out on page 6 of the Petition, this fact was also directed to the attention of the Supreme Court of Ohio in oral argument.

Certain Canons of Ethics of the American Bar Association seemingly have had an important part in producing the petitioner's alleged difficulty. Canon 30, as pertinent hereto, states:

> "A lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. * * * His appearance in court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination."

The entire proceedings of the trial in which the respondent participated as associate trial counsel have been transcribed and were available for study by every lawyer whom petitioner might have consulted, or could. It is suggested that an examination of the pleading which the petitioner prepared and sought to prosecute, as well as a study of the transcribed record of the five weeks trial, must inevitably have resulted in an application of the above principles of Canon 30. Further, Canon 31, as pertinent hereto states:

> "No lawyer is obliged to act either as advisor or advocate for every person who may wish to become his

client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel, what causes he will bring into court for plaintiffs, what cases he will contest in court for defendants. The responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility."

The respondent cannot help but believe that all counsel consulted by the petitioner, including those presently representing the petitioner, have declined to assist in prosecuting the petitioner's purported counter-claim in the light of the provisions of Canon 31.

Right of a Corporation to Represent Itself in Court Without Benefit of Counsel.

The petitioner is a corporation. It complains in this case that it has been prevented from undertaking before a court of law what a natural person might be allowed to do. Although for certain purposes, in the eyes of the law, a corporation is recognized as a "person," such recognition is neither absolute nor all-inclusive, nor can it be claimed to exist for all purposes.

The use of the corporate device for the protection of those individuals desiring to limit their financial responsibilities is necessarily accompanied by certain limitations and restrictions. One such restriction, and an obviously reasonable one, is that a corporation may not appear as the respondent has in the instant case "propria persona" and act as counsel on its own behalf before a court of law.

It is asserted, page 10 of the Petition, that a corporation is "within the ambit" of the Equal Protection Clause of the Fourteenth Amendment. Undoubtedly this is true. Cited in support of that statement is the case of *Santa Clara County vs. Southern Pacific Railroad*, 118 U.S. 394.

So far as the question presented in the case at bar is concerned, that citation provides the petitioner with no support since the defendant corporation in the cited case was well represented by counsel at all stages.

Also cited by the petitioner as supporting its contention, page 10 of the Petition, is the case of *Barbier vs. Connolly*, 113 U.S. 27. However, that case also furnishes no support for the petitioner in the question it seeks to present. No corporation was a party to the *Barbier* case. For the same reason, the reference in the quotation from the opinion of this Court in that case, on page 10 of the Petition, containing the words "all persons," offer no support whatever for the petitioner's contention that in that case this Court believed, or purported, that it was including the right of a corporation to appear and to represent itself before a court of law.

On the other hand, essentially all courts that have considered this question have decided adversely to petitioner's contention. We submit the following:

J. T. Whalen, Inc. vs. Pritzert, 3 N.Y. Supp. (2d) 418:

> Syl. 1. "A corporation may not appear in person and act for itself."
>
> Syl. 3. "Legal proceedings may not be conducted in court by an employee of a corporation who is not an officer of the court."
>
> Opinion. "Legal proceedings are not to be conducted in court by an employee of a corporation who is not an officer of the court, not subject to the discipline of the court, and knowing but one master, the corporation which employs him. The obvious dangers of tolerating such a practice are too great."

Aberdeen Bindery, Inc. vs. Eastern States Printing and Publication Co., 3 N.Y. Supp. (2d) 419:

Syl. 2. "A corporation has no ability or authority to appear in propria persona at common law or in the absence of an authorizing statute."

Syl. 3. "The constitutional provision that corporations may sue and be sued is declaratory of that right and does not authorize an appearance by a corporation in propria persona."

Syl. 5. **"The statute authorizing a party to prosecute or defend a civil action in person or by attorney contemplates a natural person and does not authorize a corporation to appear in propria persona."**

Syl. 14. "A corporation was not authorized to appear or answer in court in person, and in a suit brought against it in the Municipal Court it could act only through a duly licensed attorney."

Paradise vs. Nowlin, 86 Cal. App. (2d) 897, 195 Pac. (2d) 867:

Syl. 3. "A natural person may represent himself and present his own case to the court although he is not a licensed attorney."

Syl. 4. **"A corporation is not a natural person but is an artificial entity created by law and as such it can neither practice law nor appear or act in person."**

Syl. 5. "A corporation cannot appear in court by an officer who is not an attorney and it cannot appear in propria persona."

Detroit Bar Association vs. Union Guardian Trust Co., 282 Mich. 216, 276 N.W. 365:

Syl. 2. "A corporation can appear in a judicial proceeding only by an attorney, regardless of whether the corporation is interested in its own corporate capacity or in a fiduciary capacity."

The same principles have been applied in the Courts of the United States:

Heiskell vs. Mozie, 82 Fed. (2d) 861:

Syl. 5. "Corporation involved in litigation cannot appear in propria persona."

Laskowitz vs. Shellenberger, 107 Fed. Supp. 397:

Syl. 2. "A corporation cannot practice law, and can act only through the agency of natural persons, and therefore it cannot appear in court by an officer of the corporation who is not an attorney, nor appear in propria persona, but must appear through a licensed attorney."

Simbraw, Inc. vs. United States of America, 367 Fed. (2d) 373:

Syl. 2. "Corporation which sought to litigate its rights in court of law would not be permitted to represent itself by its president, but would be required to employ an attorney at law to appear for it and to represent it in the litigation."

In its opinion in the *Simbraw* case, the Court quoted with approval the case of *MacNeil vs. Hearst Corp.*, 160 Fed. Supp. 157:

Opinion. "May a corporate plaintiff institute and prosecute a civil suit in court by its corporate officers alone?

"The answer to the question must be in the negative. The authorities in the federal courts which have determined the question are uniform in holding that a corporation can do no act except through its agents and that such agents representing the corporation in court must be attorneys at law who have been admitted to practice, are officers of the court and subject to its control."

In its opinion in that case, an observation was made which could well apply to the case at bar:

"The confusion that has resulted in this case from pleadings awkwardly drafted and motions inarticulately presented demonstrates the wisdom of such a policy."

CONCLUSION.

The petitioner in this case is not complaining that it was not treated before the courts of Ohio as precisely all other corporations are treated before the courts of that State, or in fact as all other corporations are treated before the courts of practically every state and before the courts of the United States.

Petitioner is complaining only that it was not treated as a natural person before the courts of Ohio instead of having been treated as the strictly artificial person it is. The treatment accorded to the petitioner before the courts of the State of Ohio is the same as has been accorded to corporations before almost all courts everywhere as far back as recorded cases go.

This established principle of law is well stated by the Supreme Court of Illinois in the case of *Nixon, Ellison and Co. vs. Southwestern Insurance Co. of Cairo, Illinois,* 47 Ill. 444:

> Opinion. "We find that as early as Lord Coke's time that it was the recognized doctrine that a corporation aggregate could not appear in person to an action. Coke Litt. 66 b. And we find the same rule announced in Comyn's Digest Pleader 2B2, where it is said, speaking of a corporation aggregate: 'But the corporation must appear by attorney.' And Chitty, Volume 1, Page 551, lays down the rule: 'A plea by a corporation aggregate which is incapable of a personal appearance must purport to be by an attorney.' "

Because of the casual nature of the efforts of the petitioner to secure counsel to represent it, consulting twelve

out of some seven thousand available counsel; because of the frivolous and unworthy nature of the claims the petitioner has sought to advance; and because, as a corporation, it has been treated like all other corporations, the petitioner's claim concerning the existence of an important and justiciable federal constitutional question is wholly without merit and its Petition should be denied.

Respectfully submitted,

EDWIN F. WOODLE,
Respondent,
In Propria Persona.